Supreme Court, U.S.
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No. 00-628

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

CYNTHIA TAYLOR,

Petitioner,

v.

HAMILTON CARMOUCHE, MARGARET FELTON, and CITY OF GARY, INDIANA

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROSALIE B. LEVINSON
Counsel of Record
LEVINSON & LEVINSON
122 W. 79th Ave.
Merrillville, IN 46410-5439
Phone: (219) 769-1164

Attorney for Respondents

26pp

QUESTIONS PRESENTED

I. Did the Seventh Circuit properly apply the controlling decisions of this Court in ruling that an employee who interjects an accusation of racism into a litany of complaints regarding office management is not necessarily protected by the First Amendment; thereby precluding review under Rule 10.

II. Should the Supreme Court review the Trial and Appellate Courts' factual determination that Taylor failed to present sufficient evidence for a jury to conclude that she was subjected to any retaliatory action for engaging in protected speech.

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STATEMENT OF THE CASE

In February, 1994, the position of Gary City Attorney became vacant. Corporation Counsel, Hamilton Carmouche, an African-American, offered the position to a white female, Margaret Felton, after a black male turned down the appointment. (R. 73, pp. 158-159, R. 75, p. 112) Carmouche had previously discussed offering the position to Cynthia Taylor, an African-American Assistant City Attorney who had been hired by the department straight out of law school in 1993. (R. 76, p. 12 and 91) Carmouche testified that he inherited an operation that was being run by secretaries. (R.73, pp. 203-204) Felton's task was to implement stricter office regulations, contrary to the more informal way things were previously handled. (R. 77, pp. 43-44; R. 76, pp. 85-86)

Felton was the only white person in the office, and her elevation to the position of City Attorney was met with resistance, described by various witnesses as "absolute revolt". (R. 73, pp. 205 & 207) One of the attorneys in the office issued a memorandum that "repeated disobedience in

the office was affecting the work of the law department." (R. 75, pp. 204-206, Exh. 79) Taylor assumed the role of spokesperson for the secretaries in their battle against Felton. (R. 73, p. 207; R. 77, p. 47) She testified that she communicated complaints to Carmouche regarding all kinds of daily things that would go on in the office. (R. 76, p. 109) Taylor contends that Felton displayed a condescending attitude toward the secretaries, which she characterized as racially motivated. However, she testified that during the whole time she worked with Felton she never heard her use a racial slur. (R. 76. p. 76) One of the black secretaries called by Taylor flatly denied that Felton was a racist. (R. 74, pp. 233-34) Carmouche testified that Felton enrolled her son in an all-black elementary school; she invited a black police department employee and her son, whose house burned down, to move into her home for a 4-month period; and Felton voluntarily came forward and offered to take a 10% salary cut in order to save the job of an African-American secretary who was to be laid off due to budgetary cuts. (R. 74, pp. 48-52) None of this was

contested.

Rebecca Smith, who initially joined in this lawsuit, filed several grievances with the City's Personnel Committee regarding disciplinary action taken against her, (R. 74, p. 11), and Taylor testified on behalf of Smith at one of these grievance hearings regarding computer problems and the atmosphere in the office. She stated that she was going to raise a race issue, but Carmouche objected. (R. 76, pp. 174-175)

Following the grievance hearing, Taylor requested a 16-week medical maternity leave, which Felton opposed because she thought this was excessive. (R. 74, p. 130) On September 23, 1994, Taylor submitted a complaint letter to the Department of Labor alleging that Carmouche opposed her request for maternity leave, as well as a workers' compensation claim, in retaliation for her testifying at Smith's grievance hearing. The letter also included allegations of race discrimination. (R. 76, p. 43) On September 30, Taylor notified Carmouche that she planned to begin her maternity leave on October 31, and she

continued to work in the Law Department without incident until the end of October.

When Taylor returned from her maternity leave on December 19, 1994, she informed Carmouche that she would need therapy for a leg injury she had sustained one year before. Her therapy would require her to leave work at approximately 2:30 p.m. three days a week. (R. 73, pp. 137-138) Pursuant to Gary's personnel policy, Carmouche asked Taylor to secure a medical evaluation. (R. 74, pp. 29-30) The City manual makes it mandatory for an employee returning to work from any health-related leave to provide a doctor's release. (R. 74, pp. 29-30) Taylor testified that the demand was not unreasonable. (R. 76, p. 159) For several weeks the City received no response regarding the requested medical documentation of fitness for duty. (R. 74, p. 30) It then received a letter dated January 18, 1995, from the hospital stating that Taylor was not to return to work at all. (R. 74, p. 31, Exh. CEEE)

On January 25, a medical release was issued by the hospital, but it stipulated that Taylor could work only 4

hours a day and had to remain in a sedentary position. Contrary to Taylor's assertion, Pet. at 5, nothing in Exh. CEEE or in the record suggests this was a stair climbing restriction imposed because Carmouche insisted she climb stairs. The same medical report was issued on February 3. (R. 74, p. 32) Taylor was never told that she was fired, and in March, when she notified the City that she apparently was able to work full time and had in fact accepted another job, the Law Department immediately sent her a letter that she was welcome to have her job back. (R. 76, pp. 83-84; R. 74, pp. 45-46)

Taylor did not accept the offer, and instead she filed suit under the Americans With Disability Act, the Family Medical Leave Act, 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, the First and Fourteen Amendments to the U.S. Constitution, as well as a State Claim for Wrongful Discharge. Smith alleged a First Amendment claim only. At the close of the plaintiffs' case, the trial judge dismissed Smith and Taylor's First Amendment Claims with respect to all speech pre-dating Taylor's

September 23 letter to the Department of Labor. That claim, together with the Title VII claims alleging race and gender discrimination and retaliation, the Family Medical Leave Act claim, the Section 1981 claim against Carmouche and Felton alleging race discrimination and retaliation, and the State claim were all submitted to the jury. The jury returned a verdict against Taylor regarding all of these claims except the First Amendment retaliation claim.

On post-trial motions, the judge entered judgment n.o.v. for Carmouche, holding that Taylor failed to present evidence from which a reasonable juror could find that Carmouche retaliated against Taylor because of the D.O.L. letter. (App. B.) The court reasoned that where the alleged retaliatory action occurs "on the heels of protected activity," this alone may establish the causal link. This, however, was not such a case because three months elapsed between the Department of Labor letter and Carmouche's decision not to allow Taylor to return from her leave without a medical certification. Taylor, therefore, needed to come forward with additional evidence to support her

claim that the request for a medical release was "retaliatory", which she failed to do. The court concluded that "the Gary Personnel Manual required an employee returning to work to provide a doctor's release and Carmouche's decision to enforce the requirement was justified." (B-9).

The Court of Appeals affirmed the District Court's ruling on the directed verdict, disagreeing that the temporal lapse was too great to support an inference of retaliation, but agreeing that "enforcing a policy applicable to all employees cannot reasonably be described as a penalty for speech." (A-6) The Court of Appeals stressed that there was no evidence "that Carmouche enforced the rule selectively." Judge Williams, who filed a dissent regarding the protected status of the pre-D.O.L speech, agreed that Taylor had no claim "relating to her reinstatement after her medical leave." (A-11) Taylor petitioned the Court of Appeals for rehearing en banc, which was denied. (C-1)

REASONS FOR DENYING THE WRIT

This petition should be denied because the Trial Court Judge and the Seventh Circuit Court of Appeals

applied well-established First Amendment Doctrine in denying Taylor's claim. Both courts below correctly analyzed the facts under the *Connick/Pickering* multi-factor balancing test, which examines content, form, and context in deciding whether an employee's speech is protected. In reality, all Taylor seeks is to have this Court review the evidence in a voluminous record, which has been inaccurately portrayed in her petition.

A. The Seventh Circuit's Ruling That an Employee's Complaint of Racism Is Not Always Protected by the First Amendment Does Not Conflict With *Connick v. Myers*.

The Seventh Circuit did not find that Taylor's allegations of racism were unprotected solely because she complained "within the context of the personnel hierarchy" (Pet. at 14). Nor did it rule that speech was unprotected because Taylor was not engaged in "public debate." The Seventh Circuit, as well as the Trial Judge below, applied well-established First Amendment Doctrine that requires judges, not juries, to examine the content, form and context

of an employee's speech to determine whether or not it is protected. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Taylor has taken statements from the Seventh Circuit's opinion out of context and has failed to provide any basis for granting a Writ of Certiorari.

Having heard all of the evidence in this case, the Trial Court Judge directed a verdict against Taylor with respect to all of her speech that predated a September, 1994 letter to the Department of Labor. In *Connick*, this Court ruled that "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of the given statement, as revealed by the whole record." 461 U.S. at 147-48. In affirming the trial judge's ruling in this case, the Seventh Circuit did not ignore the statement in *Connick* that race discrimination is "a matter inherently of public concern". Rather, it simply concluded, looking at the record as a whole, that under the circumstances in this case, interjecting a claim of racism into a litany of complaints about an allegedly dictatorial supervisor was insufficient to

convert what was basically an intra-office dispute into protected speech.

The Seventh Circuit was guided by *Connick*, where this Court found that even though some of the employee's speech concerned issues of public concern, "The speech as a whole must be deemed work-related." The Supreme Court has never ruled that content alone is determinative. Indeed, in the footnote cited by Taylor, this Court in *Connick* specifically noted that when Mrs. Givhan protested race discrimination, she spoke out "as a citizen on a matter of general concern, *not tied to a personal employment dispute...*" 461 U.S. at 148, n.8 (emphasis added). If employees are simply airing personal disagreement with the supervisor's decisions and if the point of the speech is to address the effect on that employee, the speech may not be entitled to First Amendment protection. Here Taylor's speech arose in the context of Carmouche appointing Felton as City Attorney, after having discussed appointing Taylor to the position. Taylor felt she had better rapport with the secretaries and

vehemently objected to Carmouche's choice. She herself testified that she communicated complaints to Carmouche "regarding all kinds of daily things that would go on in the office." The facts are strikingly similar to those in *Connick* where an attorney's speech arose in the context of her dissatisfaction with her boss' decision to transfer her to a different division in the law department. The Trial Judge here acknowledged that "racism is a matter of public interest," but he concluded that the evidence as a whole demonstrated "that the motive behind the plaintiffs' complaints of racism were personal and that they were related solely to disagreements that the plaintiffs had with their own working conditions." (B-15)

The context of speech helps to distinguish between a personal crusade and an interest in informing the public. Where an employee raises issues to bolster her own position in a personal dispute with superiors, the speech may not be entitled to First Amendment protection. As in *Connick*, the majority of Taylor's complaints involved office morale, intra-office policies, and grievance procedures.

Accusing one's superiors of racism or sexism, regardless of how unfounded, does not automatically elevate an employee's speech to absolute protected status. *Connick* did not require this; indeed any such rule is directly contrary to *Connick's* admonition that courts must engage in a "particularized balancing" of the competing interests, including "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 140 and 150. The Court cautioned that "Because of the enormous variety of fact situations", it was inappropriate to lay down any flat rules. *Id.* at 154.

Taylor wrongly accuses the court, Pet. at 14, of ruling that her testimony on behalf of Smith was unprotected merely because it was part of an internal grievance procedure. Rather, the court recognized that there is no definitive rule that an employee who testifies before an official government agency necessarily speaks in a context that is protected by the First Amendment. As the Seventh Circuit ruled in *Wright v. Illinois Dept. of Children & Family Serv.*, 40 F.3d 1492 (7th Cir. 1994), "Airing

private gripes in the form of a complaint or testimony cannot alter their status as private gripes."

Further, Taylor contends that the Seventh Circuit erred in confusing the law of defamation with that of employee speech when it ruled that employees who make "unsupported defamatory statements" may be penalized without offending the First Amendment. (A-10) The Seventh Circuit correctly cited *Waters* for the proposition that "So long as the employer honestly and reasonably believes that workplace speech is inappropriate or disruptive", the Constitution permits an employer to respond to that speech. (A-11) The Seventh Circuit did not engage in impermissible fact-finding. Taylor brought claims against Carmouche and Felton individually under § 1981, accusing them of racial animus in their operation of the law department, as well as retaliation. Taylor contends that Carmouche contested the allegations of racism "at trial, and he lost." (Pet. at 17) To the contrary, the jury returned verdicts in favor of both Carmouche and Felton, denying Taylor's claims of racial bias under § 1981, as well

as under Title VII. Statements made in reckless disregard for their truth about a supervisor are not entitled to full First Amendment protection. *Connick* requires courts to balance competing interests and the false, "defamatory" nature of speech is certainly relevant to this inquiry.

Even if, as in *Connick*, one aspect of Taylor's speech was of public concern, the Seventh Circuit was justified in concluding the speech was unprotected. The Court of Appeals cited extensively to *Waters v. Churchill*, 511 U.S. 661, 672-75 (1994), wherein this Court emphasized that government employers must be permitted to restrain employees who "do or say things that detract from the agency's effective operation." (A-8-9) The Trial Judge concluded that there was "united revolt, open opposition by all of the secretaries," and that Taylor was leading the secretaries' battle against Felton. One of the non-defendant attorneys in the office in this case issued a memorandum stating that "Repeated disobedience in the office was affecting the work of the law department." The Seventh Circuit correctly determined that the Gary Law

Department's right to maintain office discipline outweighed any interest Taylor had in speaking out about what she perceived to be mismanagement, even if she interjected a claim of racial bias into her grievances. The Supreme Court in *Connick*, after similarly concluding that one aspect of Myers' speech was of public concern, ruled nonetheless that the speech value was outweighed by the disruptive potential it would cause in that law department. 461 U.S. at 154.

Taylor wrongly accuses the Seventh Circuit of making factual, credibility determinations. She ignores the well-established rule that it is for the Court, not a jury, to examine "form, context, and content" to assess whether speech should be deemed to be of public concern and to determine whether, on balance, that speech is protected by the First Amendment. Further, she misrepresents the record when she asserts, Pet. at 13, that the "burden to the City of Gary from this speech is purely speculative." Here, unlike the situation in *Rankin v. McPherson*, 483 U.S. 378 (1987) relied upon by Taylor, there was not only fear that speech

would interfere with the Law Department; rather, numerous witnesses testified that the battle Taylor was leading on behalf of the secretaries was affecting the workplace. Taylor was not a "low-ranking attorney" in a municipal office who, like the employee in *Rankin*, merely made a misguided statement to a co-worker. Taylor sought to undermine Carmouche's decision to appoint Felton, and she actively interfered with the disciplinary decisions he was making with regard to the secretaries. The Court in *Connick* cited the need for employees "to maintain close working relationships with their superior" in the District Attorney's office. 461 U.S. at 151. Just as in *Connick*, Taylor's persistent attacks on her superiors was interfering with working relationships in the Law Department. The Court in *Connick* explained that "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-152.

In short, the Seventh Circuit correctly applied well-established Supreme Court precedent in concluding that

based on the content, form, and context of the speech, Taylor's expression related to her personal interest as an employee and thus, even if one aspect of it may be deemed to be of public interest, it was unprotected. The Seventh Circuit correctly determined that Taylor was protesting in her capacity as an employee, and that Carmouche and Felton properly acted "in their capacity as supervisors of the Law Department rather than as regulators of private speech." (A-10, citing *Waters*)

B. The Seventh Circuit Properly Affirmed the Trial Court's Ruling That Taylor Was Not Subjected to Retaliatory Action For Filing a Letter With the Department Of Labor, And There is No Reason for the Supreme Court to Review Its Decision.

The Trial Judge did find that Taylor's September 23 letter to the Department of Labor was protected speech, and he so instructed the jury. (B-5) However, he subsequently set aside the jury's verdict for Taylor and granted Carmouche judgment as a matter of law, concluding that a reasonable jury could not find that Taylor was retaliated against for

filing the letter of protest with the Department of Labor. Taylor accuses the Seventh Circuit of finding "a new reason" to reverse the jury's verdict, but, in reality, its rationale comes directly from the Trial Judge's opinion, which stated that: "The Gary personnel manual required an employee returning to work to provide a Doctor's release and Carmouche's decision to enforce the requirement was justified." (B-9). The Seventh Circuit similarly concluded that "enforcing a policy applicable to all employees cannot reasonably be described as a penalty for speech," especially since "No evidence of record implies that Carmouche enforced the rule selectively." (A-6) The Court did not make credibility determinations -- indeed Taylor herself testified that Carmouche's demand that she secure medical certification of her ability to return to work was not unreasonable. (R-76, p. 150).

Taylor contends that the issue of whether she was "constructively discharged" after the D.O.L letter was a "question of fact." The facts were uncontested, however, that the City received no medical documentation for four

weeks. Taylor argues, Pet. at 20, that she "was still refused reinstatement," even after she submitted the medical evaluation. She fails to mention, however, that the hospital report issued on January 18, 1995, stated that Taylor was *unable* to return to work. It is also uncontested that the subsequently issued hospital reports stipulated that Taylor could work for only 4 hours a day and had to remain in a sedentary position. Contrary to Taylor's suggestion, Pet. at 5, there was absolutely no indication in these medical reports that these conditions were linked to Taylor being on the 4th floor of the law department. Taylor's medical status, as reflected in these reports, did not change through March. In March, when the City learned that Taylor could, in fact, resume full-time employment, it extended an offer to her to return.

The fact that the trial Judge may have initially decided to send this aspect of the case to a jury in no way condemns his subsequent decision, in reviewing the entire record, that the jury's verdict was unsupported by the evidence. The question of whether Taylor was retaliated

against for sending the D.O.L. letter was properly decided by the courts below, first by the trial court judge and then by the appellate court panel that unanimously affirmed this part of the decision. Taylor asks this Court to grant certiorari despite the well-established principle that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Taylor relies on this Court's recent pronouncements in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), to support her argument. *Reeves*, however, admonished courts to look to "the strength of the plaintiff's prima facie case" and "the probative value of the proof that the employer's explanation is false." This is precisely what occurred here. Unlike *Reeves*, Taylor was not able to establish a prima facie case because she had no evidence linking her protected speech to any penalty. Further, the legitimacy of Carmouche's explanation for not allowing Taylor to return to work on December 19, namely her

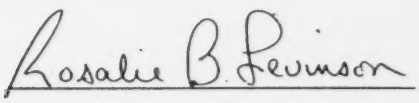
failure to secure a medical evaluation pursuant to a mandatory city policy, was not refuted by any evidence. The trial judge rejected her post-trial motion on this issue, the appellate court agreed, and her petition for en banc review was denied.

The determination made by the courts below did not involve "witness credibility" or the "drawing of inferences from facts". Taylor would have this Court re-examine a voluminous record to determine whether Carmouche's request for medical certification and his subsequent compliance with the medical evaluation was unwarranted. She points to nothing in the record, however, refuting the findings below that the City Personnel Manual makes medical certification mandatory, and that the rule was not applied any differently to anyone else. Rule 10 provides that certiorari petitions should not be granted where plaintiff merely claims misapplication of a properly stated rule of law or erroneous factual findings.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit's decision is clearly correct and conforms to settled law from this Court. Taylor does not suggest an intercircuit conflict, nor will the issues she raises have implications beyond her dispute with the City. Respondents therefore respectfully urge this Court to deny Taylor's Petition for Writ of Certiorari.

Respectfully submitted,



ROSALIE B. LEVINSON
Counsel of Record
LEVINSON & LEVINSON
122 W. 79th Ave.
Merrillville, IN 46410-5439
Phone: (219) 769-1164

Counsel for Respondents